**ORIENTAL BANK BHD**

**v.**

**SYKT ZAHIDI SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-1000-1997]
7 DECEMBER 1998

***LAND LAW:*** *Sale of land - Order for sale - Auction date not stipulated in perfected order - Whether order for sale a nullity - Whether only 'invalidated' - Whether order still valid until set aside - Whether order for sale may be corrected by amendment - National Land Code 1965, s. 257(1)(b) - Rules of the High Court 1980, O. 20 r. 11 - 'Slip rule' - Inherent jurisdiction of court*

***CIVIL PROCEDURE:*** *Judgments and orders - Amendment of order - Auction date not stipulated in perfected order for sale - Whether order may be corrected by amendment - Rules of the High Court 1980, O. 20 r. 11 - 'Slip rule' - Inherent jurisdiction of court - Considerations - Whether omission to include specific date due to mistaken appreciation of evidence or law or whether due to accidental slip - Whether judge had directed mind to issue of specific date - Whether defendant would suffer prejudice if order amended*

The plaintiff had obtained an order for sale of the defendant's property by way of public auction pursuant to s. 256 of the National Land Code 1965 ('the NLC'). However, contrary to s. 257(1)(b) of the NLC, the said order failed to specify a date on which the sale was to be held as plaintiff's counsel, instead of requesting for a specific date to be fixed, had merely asked for the sale to be held on a date not less than one month from the date of the order for sale. This notwithstanding, the said order was perfected and sealed. The plaintiff now applies for an order that a specific date be fixed for the sale.

**Held:**

**[1]** The provisions of s. 257(1)(a) to (d) of the NLC are mandatory and thus the order of sale which was granted is "invalidated". The term "invalidated" has been defined as meaning "rendered of no force and effect, for all practical purposes". Hence, the order for sale is not a nullity. It will continue to have binding force until set aside, or to make the order effective, if an application is made to amend, alter or vary the said order.

**[2]** A court becomes *functus officio* and has no power to alter, vary or set aside a judgment or order that has been perfected. However, there is an exception to this general principle under the slip rule to correct errors in expressing the intention of the court unless it is a judgment by default or made in the absence of a party at a trial or hearing.

**[3]** The court has to determine whether the omission to include a specific date in an application for an order for sale was due to a mistaken appreciation of the evidence or of the law or whether it was due to an accidental slip or omission. In this case, the error arose out of counsel's omission to ask for a specific date although he had prayed for an order that a date be set not less than one month from the date the order for sale was made.

**[4]** If a judge is addressed on a particular issue and having directed his mind to that issue, he decides upon it, there can certainly be no alteration under the slip rule, even if the learned judge had fallen into obvious error in principle. The omission here, however, is because the judge was not asked for a specific date and the judge did not direct his mind to that issue. Therefore, the application to amend the order under the slip rule ought to be allowed.

**[5]** In addition to the slip rule, the court has an inherent jurisdiction to rectify an order so as to make it carry out the intention and express the meaning of the court when the order was made. Pursuant to s. 3(1)(a) of the Civil Law Act 1956, this common law jurisdiction is applicable here.

**[6]** In considering the request to amend or correct the earlier order, the court must give effect to the intention of the court at the time when the earlier order was made.

**[7]** At all material times the plaintiff intended for the court to specify a date for the sale of the charged property by auction, such date being a date not less than one month from the date of the order for sale. There was clearly an oversight and an accidental slip or omission on the part of counsel to request for a specific date. Further, the court is satisfied that had the issue of the specific date of the sale been brought up before the court during the earlier hearing, the date of the sale would have been specified.

**[8]** If the order for sale is to be set aside it would be the defendant who would suffer additional prejudice. This is due to the fact that the plaintiff would then be free to request that a date be fixed for the hearing of the originating summons and thereafter attend a hearing to reapply for a fresh order for sale with its attendant costs and delay and increased costs as an order for sale not being a final order but the expression of the exercise of the statutory rights of a chargee under the NLC does not give rise to any plea of *res judicata* being available to the chargee or chargor. In such an event, in all likelihood, the court if it so chooses to grant an order for sale would do so with an order for costs against the defendant as the usual exercise of the court's discretion is based upon the principle that costs follow the event.

*[Application allowed; specific date ordered to be fixed.]*

**Cases referred to:**
*Afad Sha Sdn Bhd v. SPPIK Dagang Sdn Bhd & Anor [1996] 3 CLJ 541* ***(aff)***
*Arjan Singh v. Hashim Angullia [1941] MLJ 196* ***(aff)***
*Armitage v. Parsons [1908] 2 KB 410* ***(refd)***
*Hock Hua Bank v. Sahari Murid [1981] 1 MLJ 143* ***(aff)***
*Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332* ***(cit)***
*Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9* ***(foll)***
*Mutual Shipping Corp of New York v. Bayshore Shipping Co of Monrovia, the Montan [1985] 1 All ER 520* ***(refd)***
*Puah Bee Hong v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur [1994] 2 CLJ 705* ***(aff)***
*Re Inchcape [1942] 2 All ER 157* ***(refd)***

**Legislation referred to:**
Civil Law Act 1956, s. 3(1)(a)
National Land Code 1965, ss. 256, 257(1)(b)
Rules of the High Court 1980, O. 20 r. 11

*For the plaintiff - JD Goonting (S Palakrishnan with him); M/s Zailan & Co*

*Reported by S Dharmendran*

## JUDGMENT

**RK Nathan J:**

### *Facts*

On 11 March 1998 the plaintiff obtained an order for sale of the defendant's property by way of public auction pursuant to s. 256 of the National Land Code 1965 (the NLC). Whilst expressly seeking an order that the sale of the charged property be held on a date not less than one month from the date of the order for sale, the plaintiff did not ask for a specific date on which the said auction ought to have been held. The said order as it stood was perfected and sealed.

### *The Application*

The plaintiff then applied for an order that a specific date be fixed for the sale with costs in the cause.

### *Issues Before The Court*

The said application gave rise to various issues for this court to consider, namely:

(1) What is the effect of an order for sale where the date of the auction is not specifically stated therein and whether such an order for sale is to be construed a nullity without the need for any proceedings commenced for the purpose of setting aside the said order for sale.

(2) Whether such an order, obtained in breach of an express provision of the NLC, may be corrected by amendment pursuant to the "slip rule", or pursuant to the inherent jurisdiction of the court.

***Findings Of The Court***

Absence of auction date in the Order for Sale

Clearly the order prayed for only asked that the sale of the charged property be held on a date not less than one month from the date of the order for sale without seeking any specific date. With forthright candour counsel concedes that the accidental omission of the date for sale in the application for sale was solely and wholly attributable to his inadvertence. Section 257(1) reads:

> 257. **Matters to be dealt with by order for sale.**
>
> (1) Every order for sale made by the court under s. 256 shall:
>
> (a) provide for the sale to be by public auction;
>
> (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;
>
> (c) specify the total amount due to the chargee at the date on which the order is made; and
>
> (d) require the registrar of the court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

Clearly the order made on 11 March 1998 is in breach of s. 257(1)(b) when it failed to specify a date which date was not less than one month after 11 March 1998. The consequence of such a failure has been considered by the Federal Court in *Maimunah bte Megat Montak v. Mayban Finance Bhd* [1996] 2 MLJ 422 FC. In a short judgment, Edgar Joseph Jr FCJ speaking for the court said as follows at p. 424:

> At the conclusion of the argument, we were unanimously of the opinion, that the provisions of s. 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from the defects herebefore mentioned, it was thereby invalidated.

Now what was the reason for their Lordships to have used the term "invalidated". In *Arjan Singh v. Hashim Angullia* [1941] MLJ 196 Aitken JA defined "invalidated" as meaning "rendered of no force and effect, for all practical purposes". With respect to their Lordships I will ascribe the same meaning to the word "invalidated" used in *Maimunah bte Megat Montak v. Mayban Finance Bhd.*

Given the meaning ascribed to the word "invalidated" I am of the view that the order made on 11 March 1998 cannot therefore be a nullity and thus void *ab initio.* It will continue to have binding force until set aside, or to make the order effective, if an application is made to either amend, alter or vary the said order. In *Afad Sha Sdn Bhd v. SPPIK Dagang Sdn Bhd & Anor* [1997] 4 MLJ 90; [1996] 3 CLJ 541, [1996] 3 AMR 2831, I had held that orders and judgments of courts of unlimited jurisdiction are valid and binding until set aside. In *Puah Bee Hong v. Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur* [1994] 2 CLJ 705; [1994] 2 MLJ 601 the then Supreme Court reiterated the principle that an order of a superior court such as the High Court, until it is set aside, must be obeyed by everyone whether its validity is challenged or not.

The issue next arises whether such an order that has been made in breach of s. 257(1)(b) of the NLC ought to be set aside or whether it can also be corrected by way of an application.

***Can The Order Be Corrected?***

Once it is apparent that to give effect to the order for sale it is pertinent that the specific date be given, and that such was not done when the order for sale was made on 11 March 1998, I am of the view that I ought to be able to correct the said order either under the slip rule, or under the inherent jurisdiction of the court to cure the invalid order for sale.

***Under The Slip Rule***

Order 20 r. 11 of the Rules of the High Court 1980 (the RHC) states as follows:

> 11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court by summons without an appeal.

In *Hock Hua Bank v. Sahari bin Murid* [1981] 1 MLJ 143 the Federal Court, whilst affirming the general principle that a court becomes *functus officio* and has no power to alter, vary or set aside a judgment or order that has been perfected (as in this case), recognised an exception to this general principle under the slip rule to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.

***Under The Inherent Jurisdiction Of The Court***

The historical origin of both the slip rule and the power to amend under the inherent jurisdiction of the court is very lucidly narrated by Robert Goff LJ in *Mutual Shipping Corp of New York v. Bayshore Shipping Co of Monrovia, the Montan* [1985] 1 All ER 520 wherein at pp. 527-528 his Lordship said:

> The slip rule, in the form in which we know it, now embodied in O. 20 r. 11, came from the old Chancery General Orders. It was first introduced, with a number of other orders, on 3 April 1828 (numbered O. 45): under the Consolidated General Orders of 1859 it became O. 23 r. 21. It provided as follows:
>
> > Clerical mistakes in decrees or orders, or errors arising from any accidental slip or omission, may at any time before inrolment be corrected upon motion or petition, without the form and expense of rehearing.
>
> However, as the words of the rule betray, there also existed in the court of Chancery a jurisdiction in the judges of the court to rehear not only their own decrees, but also the decrees of their predecessors. Under that jurisdiction, after a decree or order had been passed and entered, any error could be put right by an application to rehear, unless the order had been enrolled; even after enrolment, there was power to vacate the enrolment on proper grounds, and when that had been done the court again had power over its own decree (see *Re St Nazaire Co* [1879] 12 Ch D 88 at 97 per Jessel MR and *Re Swire, Mellor v. Swire* [1885] 30 Ch D 239 at 246 per Lindley LJ). So there was, in the court of Chancery, the most ample procedure for correcting errors in judgments and orders. It is understandable that, in that court, concerned as it was with property matters which can generate orders of considerable complexity, there should have developed a more complex procedure for correcting errors in orders than in the courts of common law. But, in the courts of common law, there has existed a power, exercised for hundreds of years before the passing of the Supreme Court of Judicature Acts of 1873 and 1875, under which the court could rectify an order, even when passed and entered, so as to make it carry out the intention and express the meaning of the court at the time when the order was made, provided that the amendment could be made without injustice or on terms which precluded injustice (see *Lawrie v. Lees* [1881] 7 App Cas 19 at 34-35 per Lord Penzance and *Re Swire* 30 Ch D 239 at 247 per Bowen LJ). Following the Judicature Acts, the jurisdiction in the court of Chancery to rehear ceased to exist, being absorbed in the appellate jurisdiction of the Court of Appeal (see *Re St Nazaire Co*), and enrolment had become obsolete. The slip rule in Consolidated General O. 23 r. 21 was not included among the new Rules of the Supreme Court enacted under the Supreme Court of Judicature Act 1875, sch I; but a slip rule in almost exactly its present form, based very closely on the old O. 23 r. 21, was added as O. 41A in December 1879 (see [1880] WN (Pt II) 16). (It was later to

become O. 28 r. 11, and is now O. 20 r. 11.) Since 1879 it has been recognised that there existed in the High Court two parallel jurisdictions: first, the jurisdiction to correct errors in judgments or orders under the slip rule; and second, the inherent jurisdiction of the court, which always existed in the courts of common law before the Judicature Acts, and has since been recognised as always having existed in the court of Chancery (see *Lawrie v. Lees* 7 App Cas 19 at 34-35 per Lord Penzance and *Re Swire* 30 Ch D 230 at 246 per Lindley LJ), to rectify an order so as to make it carry out the intention and express the meaning of the court when the order was made (see *Ainsworth v. Wilding* [1896] 1 Ch 673 at 677 per Romer J). It is probable that the inherent jurisdiction to rectify survived the Judicature Acts by virtue of the note to Sch I to the 1875 Act, setting out the new Rules of the Supreme Court, that, where no other provision was made by the Act or the new rules, the present procedure and practice remained in force.

Now, it is to be observed that these two jurisdictions, though they may overlap, are not the same. The jurisdiction under the slip rule is concerned with (1) clerical mistakes in judgments or orders, and (2) errors arising in judgments or orders from any accidental slip or omission; whereas the inherent jurisdiction is concerned with ensuring that the judgment or order does give effect to the intention of the court at the time when it was made, whether the failure of the judgment or order to do so is the result of the clerical mistake in it, or of an error arising from an accidental slip or omission, or otherwise. No doubt, the inherent jurisdiction will not be invoked except in cases which do not fall within the slip rule.

In the circumstances, pursuant to the provision of s. 3 of the Civil Law Act 1956, the common law jurisdiction referred to in *the Montan* would similarly be applied here.

Section 3(1)(a) of the Civil Law Act reads as follows:

3. Application of U.K. common law, rules of equity and certain statutes.

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall:

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956.

I have to ask myself whether the omission to include a specific date in an application for an order for sale was due to a mistaken appreciation of the evidence or of the law or whether it was due to an accidental slip or omission. In *Armitage v. Parsons* [1908] 2 KB 410, the plaintiff signed a judgment in default of appearance by the defendant. However, due to a slip up of his solicitors' clerk, the plaintiff included in the sum in respect of which judgment

was signed, costs on too high a scale, so that the judgment was signed for a sum which was too high. The Court of Appeal held, by a majority, that the defendant was not entitled to have the judgment set aside, but that the judgment should be amended under the slip rule. It is important therefore in considering the request to amend or correct the earlier order, that the court must give effect to the intention of the court at the time when the earlier order was made. In this case the error arose out of counsel's omission to ask for a specific date although he had prayed for an order that a date be set not less than one month from the date the order for sale was made. This brings to mind the case of *Re Inchcape* [1942] 2 All ER 157 where the court allowed an application to include costs not asked for in the order. The court held that the error arose from an omission of counsel to direct the judge's attention to those costs which would have been included if the learned judge's attention had been so directed. The application was allowed under the slip rule. There is no doubt that if a judge is addressed on a particular issue and having directed his mind to that issue, he decides upon it, there can certainly be no alteration under this slip rule, even if the learned judge had fallen into an obvious error in principle. The omission here is because the judge was not asked for a specific date and the judge did not direct his mind to that issue. Clearly therefore I can and ought to allow the application to amend the order under the slip rule.

Having read the originating summons and the eventual order for sale, I am convinced that at all material times the plaintiff intended that the court do specify a date for the sale of the charged property by auction, such date being a date not less than one month from the date of the order for sale. There was clearly an oversight and an accidental slip or omission on the part of counsel to request for a specific date. Further, I am satisfied that had the issue of the specific date of the sale been brought up before me on the hearing of the originating summons on 11 March 1998, I would have no hesitation in specifying the date for the sale. I may also add that even if an oral application had been made on that date to amend the application to include a prayer for a specific date for the sale, I would have been minded to grant such an order.

***Issue Of Prejudice***

Having considered all issues it is my judgment that any correction under the slip rule or under the inherent jurisdiction of the court would not cause any prejudice to the defendant given the fact that the defendant has not seen it fit to contest these proceedings despite being served.

Further if the order for sale is to be set aside it would be the defendant who would suffer additional prejudice. This is due to the fact that the plaintiff would then be free to request that a date be fixed for the hearing of the originating summons and thereafter attend at the hearing to reapply for a fresh order for sale with its attendant costs and delay and increased costs as an order for sale not being a final order but the expression of the exercise of the statutory rights of a chargee under the NLC does not give rise to any plea of *res judicata* being available to the chargee or chargor (see *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119). In such an event, in all likelihood, the court if it so chooses to grant an order for sale would do so with an order for costs against the defendant as the usual exercise of the court's discretion is based upon the principle that costs follow the event. Such an order for costs would include all costs already incurred in obtaining the order for sale and would unnecessarily prejudice the defendant in terms of additional costs. Further and in any event, there is provision in cl. 45 of the charge dated 8 February 1996 which would entitle the plaintiff chargee to debit the chargor's account for all costs incurred to date.

In the circumstances, having considered all issues I hereby allow the plaintiff's application and order that a specific date be fixed for the sale with costs in the cause. I therefore fix the date as 5 January 1999.